RECORD
AND
BRIEF

Supreme Court, U.S.
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No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

Ilya Shapiro
Counsel of Record
Frank Garrison
Cato Institute
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

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QUESTION PRESENTED

Whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside of the statute's definition of a "whistleblower."

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. In 1989, Cato established the Center for Constitutional Studies to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case interests Cato because it concerns how courts approach administrative rulemaking, a core check-and-balance mechanism in our separation of powers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus agrees with the petitioner that the statutory text of the Dodd-Frank Act is unambiguous and thus forecloses respondent's claim. *See* Pet. Brief at 16-30. This brief will focus on why the Court should not grant *Chevron* deference to the Securities and Exchange Commission's interpretation of that Act even if it finds the statutory text ambiguous: The SEC ignored a basic tenet of administrative due process and violated the Administrative Procedure Act (APA) when it failed to provide fair notice to the public that it would redefine—and thus expand—the definition of "whistleblower" in its final rule.

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[1] Rule 37 statement: All parties lodged blanket consents and received timely notice of *amicus*'s intent to file this brief. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* funded its preparation or submission.

Dodd-Frank defines a "whistleblower" as an "individual who provides . . . information relating to a violation of the securities laws *to the [Securities and Exchange] Commission.*" 15 U.S.C. 78u-6(a)(6) (emphasis added). The Act then protects a "whistleblower" from retaliation if that person reports a violation of certain laws—including the Sarbanes-Oxley Act of 2002—to a supervisor, agency, or Congress. 15 U.S.C. 78u-6(h)(1)(A). This statute is clear: If a person reports a violation of the covered laws to the SEC, Dodd-Frank provides them a remedy to protect themselves from retaliating employers. *See* Pet. Brief at 16-30.

In 2010 the SEC agreed. In its Notice of Proposed Rulemaking (NPRM), the SEC defined "whistleblower" in line with the statutory definition: "You are a whistleblower if, alone or jointly with others, you provide *the Commission* with information relating to a potential violation of the securities laws." *Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, 75 Fed. Reg. 70,488, 70,489, 70,519 (Nov. 17, 2010) (emphasis added); Pet. Brief at 41. So far, so good. The SEC's NPRM did not try to change the statute's definition, it did not indicate that it was contemplating doing so, nor did it ask for comments on whether it should. Indeed, there was no mention at all that it would expand the statute's meaning as to who qualifies as a "whistleblower."

When the SEC promulgated its final rule in 2011, however, something was different: The SEC expanded the definition of "whistleblower" (for anti-retaliation purposes) to cover people—including the respondent—who do not report a violation of the relevant securities laws to the SEC, so long as he or she has undertaken

the protected activity listed in 15 U.S.C. § 78u-6(h)(1)(A). 76 Fed. Reg. 34,300, 34,301-34,304, 34,363 (June 13, 2011); Pet. Brief at 42. The SEC did not try and explain why it was changing the definition in its final rule, nor did it cite to any public comment that led it to do so. It merely announced that it was expanding the definition of "whistleblower" to reach those who do not report covered securities violations to the SEC. Pet. Brief at 43.

The APA's notice-and-comment procedures simply don't allow the SEC to do this. The APA requires an agency conducting notice-and-comment rulemaking to provide the public with "fair notice" of what will be, or might be, included in its final regulation. *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 174 (2007) (citations omitted). As noted, there was nothing in the SEC's NPRM that would give any notice—let alone "fair notice"—to the public that it was going to change whom Dodd-Frank would protect from retaliation.

This Court reaffirmed in *Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117 (2016), that procedurally deficient rules that violate the APA do not receive *Chevron* deference because they lack the "force of law." The SEC regulation here violated the APA by not giving the public fair notice that it was contemplating expanding the definition of "whistleblower" in its final rule. The regulation thus does not have the force of law and does not qualify for *Chevron* deference.

The APA serves as a vital procedural check on an ever-growing administrative state. When agencies like the SEC flout these important administrative due process provisions, the Court should not reward them with *Chevron* deference.

ARGUMENT:

THE GOVERNMENT'S REGULATION IS PROCEDURALLY DEFECTIVE AND THUS DOES NOT MERIT *CHEVRON* DEFERENCE

A. The SEC Regulation Violated the APA When It Failed to Give the Public Fair Notice in Its Notice of Proposed Rulemaking

The APA requires, with limited exceptions, agencies conducting notice-and-comment rulemaking to publish a notice of proposed rulemaking in the federal register and, among other things, include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). This in turn allows interested parties and the public to comment on the rule. *Id.* at 553(c). Once the comment process is complete, the agency then publishes a final rule incorporating—or not—input that it received during the comment period. *Id.* Within this procedural scheme, the agency's final rule must be the "logical outgrowth" of the proposed rule. *Long Island Care at Home, Ltd.*, 551 U.S., at 174. "In short," this Court has held, the rule is one of "fair notice." *Id.*

While this Court has had limited opportunity to address the contours of what constitutes a logical outgrowth, many of the circuit courts—most often the D.C. Circuit—have established a framework for when notice will be fair and adequate. This framework takes into consideration both an agency's need for flexibility in adapting proposed rules into final rules, and the regulated public's administrative due process rights guaranteed by the APA.

Accordingly, an agency's "final rule need not match the rule proposed" completely, because "[a]gencies should be free to adjust or abandon their proposals in light of public comments or internal agency reconsideration[.]" *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (citations omitted). But there are limits to how far an agency can deviate from its proposed rule. Indeed, if that were not so, the agency would have "carte blanche to establish a rule contrary to its original proposal." *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985).

A court should thus consider whether "the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed. The adequacy of the notice depends . . . on whether the final rule is a logical outgrowth of the proposed rule." *Kooritzky*, 17 F.3d, at 1513 (cleaned up). In other words, "the logical outgrowth formulation may be merely another way of asking 'how much notice is enough.'" *Id.* (citation omitted).

The circuit courts have described how much notice is enough in various ways. *See, e.g., Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) ("[W]e have refused to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities."); *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) ("A rule is deemed a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."); *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) ("[A]n unexpressed intention cannot convert a final rule into a 'logical outgrowth' that the public should

have anticipated. Interested parties cannot be expected to divine the EPA's unspoken thoughts.") (citation omitted); *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986) ("The test that has been set forth is whether the agency's notice would fairly apprise interested persons of the subjects and issues [of the rulemaking].") (cleaned up).

Drawing from circuit court opinions in *Long Island Care*, this Court boiled the test down to one of "reasonable foreseeability." *See Long Island Care at Home, Ltd.*, 551 U.S., at 175. In that case, the Court had to decide whether the Labor Department gave fair and adequate notice when it issued a regulation exempting certain domestic service employees from provisions of the Fair Labor Standards Act. In holding that it did, the Court reasoned that because the agency "*consider[ed]* not exempting some of those employees in its notice, but ultimately decided to leave them exempt, it had given reasonable, foreseeable notice to the public. *Id.* (emphasis in the original). Thus, if the agency addresses the subject matter in some fashion in its NPRM, the court reasoned, that is enough to provide the public fair and adequate notice. *See id.*

Nevertheless, no matter what might constitute fair notice, it was not present here. The SEC's NPRM did not give any consideration to changing the statutory definition. As noted above, it gave regulated parties no notice—indeed, no indication at all—that it was going to expand the definition of "whistleblower." Pet. Brief at 42. There is simply no argument that silence in an NPRM constitutes "reasonable, foreseeable" notice. Indeed, as one court has held: "something is not a logical outgrowth of nothing." *Kooritzky*, 17 F.3d at 1513.

The SEC's final rule was therefore not a logical outgrowth of its NPRM and thus did not give the public fair notice. This is a violation of the APA.

B. The SEC Regulation Violated the APA and Thus Should Not Get *Chevron* Deference

This Court does not defer to agency regulations that do not meet certain threshold requirements. One requirement, of course, is that it must meet the familiar two-step *Chevron* analysis: the statute must be ambiguous and the agency's interpretation must be reasonable. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-844 (1984).

Another requirement is that the agency issues its regulation in a way that carries the force of law. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

An agency can typically satisfy this force-of-law requirement by promulgating a rule through notice-and-comment rulemaking. When Congress delegates the power to promulgate rules through "notice-and-comment rulemaking, that relatively formal administrative procedure is a very good indicator that Congress intended the regulation to carry the force of law, so *Chevron* should apply." *Navarro*, 136 S. Ct. at 2125.

Simply going through the motions of notice-and-comment, however, is not enough. The agency must

also follow the proper procedure before a court will invoke *Chevron*. *Id.* This Court explicitly held as much two terms ago in *Navarro*: *Chevron* deference will not apply "where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." *Id.* (citing *Mead Corp.*, 533 U.S., at 227); *see also, Long Island Care at Home, Ltd.*, 551 U.S. at 174-176 (granting *Chevron* deference where an agency's regulation procedure was not defective).

This is for a good reason: If Congress has instructed the agency to go through this process, but the agency ignores that command, then it is not acting within its statutory mandate and thus is not acting with the force of law. *See Navarro*, 136 S. Ct. 2117, at 2127; *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) ("Certainly regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act.") (footnote and citations omitted); *see also*, Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 886 (2001) (noting that "the APA and due process law demand compliance with these [APA] procedures before agencies can take action that binds the public with the force of law.").

For example, imagine Congress has delegated an agency like the SEC authority to execute a statute through notice-and-comment rulemaking. The agency promulgates a proposed regulation on a giant banner and flies that banner across the United States. The regulation is interpreting an ambiguous statutory provision. If that agency then claimed its interpretation on the banner warranted *Chevron* deference after it publishes its final rule, this Court—and hopefully any

court—would strike the regulation down in a heartbeat. But why would it do so? Congress has delegated authority to the agency to fill gaps in the statute and the statute is ambiguous. Imagine, too, that the interpretation promulgated on the banner is reasonable and fully explained why it was adopting the regulation. The banner asks for comments on its interpretation, and gives a website where the public can do so as well. Despite meeting most of the *Chevron* benchmarks, no court would give the regulation *Chevron* deference because it did not follow proper APA procedure and thus lacked the force of law.[2]

For the very same reason that the above banner regulation would not get *Chevron* deference, the SEC's regulation should not either: The SEC's regulation expanding the "whistleblower" definition in Dodd-Frank did not follow proper APA notice-and-comment procedure and thus does not have the force of law. *See Navarro*, 136 S. Ct. at 2125.

C. Withholding Deference When Rules Do Not Follow Proper Procedure is Essential For Administrative Due Process

The number of books, law review articles, and judicial opinions questioning the constitutional foundations of the modern administrative state could fill a small library. It is well known that many observers, including members of this Court, believe that the modern administrative state is in tension with—if it does

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[2] *See also*, Michael Pollack and Daniel Hemel, *Chevron Step .5*, Yale J. on Reg.: Notice & Comment (2016), http://bit.ly/2wDMKJH (using a similar example of writing a regulation on napkin and nailing it to the White House door).

not outright subvert—the Framers' constitutional design. *See e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).[3]

What's more, executive agencies now exercise authority over nearly—if not all—"economic, social, and political activities" in this country in some form or fashion. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878, (2013) (Roberts, C.J., dissenting). This development has resulted in a bloated administrative state that "would leave [the Framers] rubbing their eyes." *Id.* (citation omitted). Indeed, the economic and social consequences are vast. By some estimates, the administrative state costs the economy well over a trillion dollars every year. *See generally* Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State* (last visited Aug. 21. 2017), http://bit.ly/2wEf4vL (estimating the cost of regulatory compliance and economic impact of federal intervention at $1.9 trillion annually).

Chevron is a big reason for this expansion. When applied, *Chevron* deference "is a powerful weapon" for agencies to use. *See City of Arlington*, 133 S. Ct., 1879. Indeed, *Chevron* is "strong medicine . . . requir[ing] courts to accept any agency interpretation that is reasonable, even if it is not the interpretation that the court finds most plausible." Merrill & Hickman, *Chevron's Domain*, 89 Geo. L.J. at 859.

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[3] *See also generally Egan v. Del. River Port Auth.*, 851 F.3d 263, 278-283 (3rd Cir. 2017) (Jordan J., concurring); Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187 (2016); Philip Hamburger, Is Administrative Law Unlawful? (2014).

But *Chevron* is still this Court's precedent. That makes it imperative that the Court police administrative agencies when they do not follow the rules Congress has mandated. Congress recognized long ago the dangers of an unchecked executive branch when it passed the APA. At bottom, the APA supplements the Constitution's procedural due process provisions to protect the regulated public from overreaching government. Indeed, it is "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government." Administrative Procedure Act: Legislative History, S. Doc. No. 298, 79th Cong., 2d Sess. 76 (1946). As then-Justice William Rehnquist described it: The APA is a "basic and comprehensive regulation of procedures . . . a legislative enactment which settled long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 523 (1978) (citation omitted); *see also*, Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1248 (1982) (the APA was a "working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.").

More specifically, the APA's procedural requirement that agencies go through notice-and-comment rulemaking is one of the most fundamental protections the people have against an overreaching executive. *See id.*; *see also*, George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1653 (1996) (noting the notice-and-comment provision "is the most important change the APA imposes on agency practice").

Indeed, the connection between congressional delegation to a federal agency to "act with the force of law and the existence of rights of public participation is not accidental." *Merrill & Hickman, Chevron's Domain*, 89 Geo. L.J. at 886. Public participation is one of the essential normative reasons why delegations from Congress to executive agencies are tolerated. *See id.*

Fair notice, moreover, is an essential part of what makes the APA's notice-and-comment procedures an effective check on the executive branch. As this Court has noted in other contexts: "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) (citation omitted). *See also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) ("[A]gencies should provide regulated parties 'fair warning' of the conduct [a regulation] prohibits or requires.") (quotation marks and citation omitted). This concept is just as important for administrative due process when the agencies are making the laws that will bind the public. Thus, as long as *Chevron* is precedent, it is essential for "democratic governance and traditions of due process" that this Court demand the public is "heard before they are subjected to the coercive power of the state." *See id.*

This Court has recognized before the APA's importance as a check on administrative governance, and on "administrators whose zeal might otherwise [carry] them to excesses not contemplated in legislation creating their offices." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (citing *United States v. Morton Salt Co.*, 338 U. S. 632, 644 (1950)) (Scalia, J., concurring). It should continue to do so here.

Accordingly, even if the Court finds the relevant Dodd-Frank provision ambiguous, it shouldn't give *Chevron* deference to the SEC's regulation.

CONCLUSION

For the foregoing reasons, and those stated by the petitioner, the decision below should be reversed.

Respectfully submitted,

ILYA SHAPIRO
Counsel of Record
Frank Garrison
Cato Institute
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

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